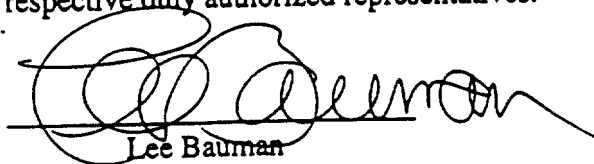


34. **GOOD FAITH PERFORMANCE**

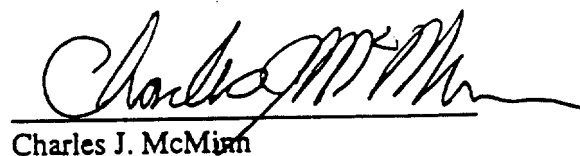
In the performance of their obligations under this Agreement, the Parties shall act in good faith and consistently with the intent of the Act. Where notice, approval or similar action by a Party is permitted or required by any provision of this Agreement (including, without limitation of the obligation of the Parties to further negotiate the resolution of new or open issues under this Agreement), such action shall not be unreasonably delayed, withheld or conditioned.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their respective duly authorized representatives.



Lee Bauman

Vice President
Local Competition
Pacific



Charles J. McMinn

President and CEO
Covad Communications Company

RECEIVED

JUN 24 1998

Federal Communications Commission
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

13
14 COVAD COMMUNICATIONS
COMPANY, a California corporation,

15 Plaintiff,
16

17 v.

18 PACIFIC BELL, a California corporation,

19 Defendant.
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28

No. C 98-1887 SI

**NOTICE AND APPLICATION FOR
PRELIMINARY INJUNCTION;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

Date: August 14, 1998
Time: 9:00 a.m.
Place: Courtroom 4
Honorable Susan Illston

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND	3
A. The Parties and Their Services.....	3
B. The Bottleneck: What Covad Needs to Compete	4
1. Collocation is the necessary first step to providing service -- and competition	5
2. Covad cannot compete without loops and transport	5
C. The Target Downstream Markets: Pacific's Monopoly	6
D. Pacific's Predatory Conduct: How It Is Maintaining and Leveraging Its Monopoly Power.....	7
1. Denial of collocation space	7
2. Late cage and transport deliveries.....	7
3. Local loop failures.....	8
4. Unilateral changes to spectral interference requirements.....	9
E. Pacific Has Acted With Improper Intent.....	10
1. The "resurvey"	10
2. Discrimination.....	10
3. The DSL rollout	11
4. Product disparagement.....	11
F. The Effect on Covad	12
G. The Effect on Competition.....	12
III. COVAD IS ENTITLED TO AN INJUNCTION TO PREVENT FURTHER DISCRIMINATORY AND ANTICOMPETITIVE CONDUCT BY PACIFIC	13
A. Standards for Injunctive Relief	13
B. Covad Is Likely to Prevail on the Merits	13
1. Section 2 Monopolization -- Monopoly Leveraging.....	14
a) Pacific's monopoly power is beyond question	14

TABLE OF CONTENTS
(Continued)

	<u>Page</u>
1	
2	
3	b) Pacific is actively leveraging its monopoly power 15
4	c) There is no legitimate business justification for Pacific's anticompetitive conduct 17
5	2. Section 2 Monopolization -- Essential Facilities 18
6	3. Section 2 -- Attempted Monopolization..... 19
7	a) Pacific has engaged in anticompetitive conduct 19
8	b) Pacific had specific intent to monopolize 20
9	c) Pacific has a dangerous probability of obtaining a monopoly 21
10	4. Telecommunications Act of 1996 21
11	5. Unfair Competition -- Business & Professions Code Section 17200..... 22
12	
13	C. The Balance of Hardships Favors the Injunction 23
14	1. Covad will be irreparably harmed in the absence of an injunction 23
15	
16	2. The proposed injunction will prevent harm to the public 24
17	3. The proposed injunction imposes no cognizable hardship on Pacific..... 24
18	IV. CONCLUSION 25
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
1 <i>Alaska Airlines, Inc. v. United Airlines, Inc.</i> , 948 F.2d 536 (9th Cir. 1991),	
2 <i>cert. denied</i> , 503 U.S. 977 (1992)	18, 19
3 <i>Aspen Skiing Co. v. Aspen Highlands Skiing Corp.</i> , 472 U.S. 585 (1985)	15
4 <i>AT&T v. City of Austin</i> , 975 F. Supp. 928 (W.D. Tex. 1997)	15, 21, 24
5 <i>Big Country Foods, Inc. v. Board of Educ.</i> , 868 F.2d 1085 (9th Cir. 1989)	13
6 <i>Calculators Hawaii, Inc. v. Brandt, Inc.</i> , 724 F.2d 1332 (9th Cir. 1983)	17
7 <i>Cargill, Inc. v. Montfort of Colorado, Inc.</i> , 479 U.S. 104 (1986)	23
8 <i>City of Anaheim v. Southern Cal. Edison Co.</i> , 1990-2 Trade Cas. ¶ 69,246,	
9 1990 WL 209261, *33 (C.D. Cal. Oct. 22, 1990), <i>aff'd</i> , 955 F.2d 1373	
10 (9th Cir. 1992)	17
11 <i>City of Anaheim v. Southern Cal. Edison Co.</i> , 955 F.2d 1373 (9th Cir.	
12 1992)	18
13 <i>Cost Management Services, Inc. v. Washington Natural Gas Co.</i> , 99 F.3d	
14 937 (9th Cir. 1996)	19
15 <i>Day v. AT&T Corp.</i> , 63 Cal. App. 4th 325 (1998)	22
16 <i>Dr. Seuss Enterprises v. Penguin Books USA, Inc.</i> , 109 F.3d 1394 (9th	
17 Cir.), <i>cert. dismissed</i> , 118 S. Ct. 27 (1997)	13
18 <i>Eastman Kodak Co. v. Image Technical Services, Inc.</i> , 504 U.S. 451	
19 (1992)	2, 14, 15, 17
20 <i>Ford Motor Co. v. United States</i> , 405 U.S. 562 (1972)	24
21 <i>High Tech. Careers v. San Jose Mercury News</i> , 996 F.2d 987 (9th Cir.	
22 1993)	17
23 <i>Image Technical Services v. Eastman Kodak Co.</i> , 125 F.3d 1195 (9th Cir.	
24 1997), <i>cert. denied</i> , 118 S. Ct. 1560 (1998)	14, 15, 18, 21
25 <i>Intergraph Corp. v. Intel Corp.</i> , 1998-1 Trade Cas. (CCH) ¶ 72,126 (N.D.	
26 Ala., April 10, 1998)	23, 24
27 <i>Iowa Utils. Bd. v. FCC</i> , 120 F.3d 753 (8th Cir. 1997), <i>cert. granted</i> , 118	
28 S. Ct. 879 (1998)	15
29 <i>MCI v. AT&T</i> , 708 F.2d 1081 (7th Cir. 1982), <i>cert. denied</i> , 464 U.S. 891	
30 (1983)	7, 19, 20
31 <i>Rebel Oil Co. v. Atlantic Richfield Co.</i> , 51 F.3d 1421 (9th Cir.), <i>cert.</i>	
32 <i>denied</i> , 516 U.S. 987 (1995)	21

TABLE OF AUTHORITIES

(Continued)

	<u>Page</u>
<i>Saunders v. Superior Court</i> , 27 Cal. App. 4th 832 (1994).....	22
<i>Southwest Marine, Inc. v. Triple A Machine Shop</i> , 720 F. Supp. 805 (N.D. Cal. 1989).....	22
<i>Spectrum Sports, Inc. v. McQuillan</i> , 506 U.S. 447 (1993)	19
<i>State Farm Fire & Casualty Co. v. Superior Court</i> , 45 Cal. App. 4th 1093 (1996).....	22
<i>Stop Youth Addiction, Inc. v. Lucky Stores</i> , 17 Cal. 4th 553 (1998).....	22
<i>United States v. AT&T</i> , 552 F. Supp. 131 (D.D.C. 1982), <i>aff'd</i> , 460 U.S. 1001 (1983).....	24
<i>United States v. AT&T</i> , 524 F. Supp. 1336 (D.D.C. 1981).....	2, 14, 23
<i>United States v. E.I. du Pont de Nemours & Co.</i> , 351 U.S. 377 (1956)	14
<i>United States v. Griffith</i> , 334 U.S. 100 (1948).....	15
<i>United States v. Grinnell Corp.</i> , 384 U.S. 563 (1966).....	14
<i>United States v. United States Gypsum Co.</i> , 340 U.S. 76 (1950).....	25
<i>William Inglis & Sons Baking Co. v. ITT Continental Baking Co.</i> , 668 F.2d 1014 (9th Cir. 1981), <i>cert. denied</i> , 459 U.S. 825 (1982).....	20

Statutes

15 U.S.C. § 2.....	passim
47 U.S.C. § 251.....	passim
47 U.S.C. §252.....	4
California Business & Professions Code § 17200	13, 22
California Business & Professions Code § 17203	22

Other Authorities

<i>In the Matter of the Application of Pacific Bell for Authority to Increase and Restructure Certain Rates of Its Integrated Services Digital Network Services</i> , Application 95-12-043	20
<i>In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996</i> , CC Docket No. 96-98, FCC 96-325, 11 F.C.C.R. 15499 (Aug. 8, 1996).....	5, 16, 21

TABLE OF AUTHORITIES

(Continued)

1		
2		<u>Page</u>
3	<i>In the Matter of Local Exchange Carriers' Rates, Terms, and Conditions</i>	
4	<i>for Expanded Interconnection, CC Docket No. 93-162, FCC 97-208</i>	
5	<i>(June 13, 1997).....</i>	4
6	<i>In the Matter of the Public Utility Commission of Texas, FCC 97-346,</i>	
7	<i>CCBPol 96-13 (Oct. 1, 1997).....</i>	15
8	<i>Opinion of the Attorney General, In the Matter of the Joint Application of</i>	
9	<i>Pacific Telesis Group and SBC Communications for SBC to Control</i>	
10	<i>Pacific Bell, A.96-04-038 (CPUC, Dec. 31, 1996).....</i>	4
11		
12		
13		
14		
15		
16		
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1 **NOTICE AND APPLICATION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on August 14, 1998 at 9:00 a.m., or as soon
4 thereafter as the matter may be heard, plaintiff Covad Communications Company will and
5 hereby does apply for a preliminary injunction ordering defendant Pacific Bell ("Pacific") (i) to
6 provide Covad with the elements of Pacific's local telephone network necessary for Covad to
7 provide Digital Subscriber Line ("DSL") service in each Central Office ("CO") where Pacific
8 plans to provide such service and has denied space to Covad, no later than the date Pacific first
9 offers such service in that CO; (ii) not to discriminate against Covad in the provisioning of
10 network elements; (iii) not to enforce any requirement that Covad use a different DSL
11 technology than it is currently using; and (iv) not to deny any request for collocation space in any
12 CO, without first proving that no collocation space exists in that CO. The relief requested is
13 described in more detail in the Proposed Order filed with this Application.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. INTRODUCTION**

16 There have been two major revolutions in the telecommunications industry in the last
17 20 years -- the breakup of the old AT&T/Bell system in the 1980s, and the Telecommunications Act
18 of 1996 (the "Telco Act"). But Pacific still acts as if these revolutions had never occurred. In the
19 time-honored tradition of local telephone monopolists, Pacific continues to exploit its absolute
20 control over the local telephone network to secure and maintain its monopoly over downstream
21 telecommunications markets. Covad asks the Court to enjoin Pacific from engaging in two classic
22 monopolist maneuvers: leveraging and denying access to essential facilities.

23 Pacific is overtly -- indeed, with great public fanfare -- exploiting its monopoly over
24 the local telephone network to gain an unfair competitive advantage over its rivals, in order to
25 maintain its existing monopoly over downstream markets dependent on that network. Pacific has
26 perfected the art of rolling an endless succession of barrels in front of its would-be competitors, the
27 cumulative effect of which is to deter and delay market entry, and reduce consumer choice. The
28 Court must intervene to prevent Pacific from simultaneously limiting the availability of its facilities

1 to competitors such as Covad, while using those same facilities to offer its own new services in
2 competition with them.

3 In this era of deregulated telephone service, Pacific no longer enjoys carte blanche
4 over its monopolized local telephone network. To the contrary, Pacific's status as a monopolist
5 means that it must now conform its conduct to the highest standards of competition:

6 Where a defendant maintains substantial market power, his
7 activities are examined through a special lens: Behavior that might
8 otherwise not be of concern to the antitrust laws -- or that might
even be viewed as procompetitive -- can take on exclusionary
connotations when practiced by a monopolist.

9 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 488 (1992) (Scalia, J.,
10 dissenting). Pacific, however, seems not to have gotten the message -- its conduct would not survive
11 scrutiny under the most charitable lens. Indeed, it continues to engage in the kind of conduct Judge
12 Greene rejected in the AT&T divestiture cases -- innumerable, seemingly small steps to hinder
13 competition, to frustrate its competitors' market entry efforts, and to protect and expand its
14 monopoly power. This is not new territory -- that conduct is illegal. *United States v. AT&T*, 524
15 F. Supp. 1336, 1344 (D.D.C. 1981) ("otherwise innocent or ambiguous behavior may violate the
16 Sherman Act when considered together with the remainder of the conduct").

17 The solution to the problem is simple. The Court can ensure competition, and
18 bring the greatest benefit to consumers, by ordering Pacific to give Covad equal access to the
19 necessary elements of Pacific's monopolized network wherever Pacific gives itself that access --
20 at the same time, and on the same terms. In other words, no more unsubstantiated and illegal
21 refusals of space in Pacific's facilities or delays in providing them -- if Pacific plans to roll out its
22 ADSL service to customers of a given Pacific central office by a given date, Pacific must also
23 assure Covad will have access to the customers served by that central office on the same date.

24 This relief serves everyone. The injunction will protect Covad from further
25 anticompetitive delays and refusals, because Pacific's own rollout of its DSL service will depend on
26 it. Consumers will also benefit, because they will receive instant choice -- both Pacific and Covad
27 will be at their doorstep at the same time. Pacific cannot be heard to complain that this cannot be
28 done. First, Pacific caused the problem, and cannot benefit by its wrongdoing. Moreover, others are

1 doing it already. US West, Pacific's ILEC neighbor, has contracted to make its facilities available to
2 Covad and all other CLECs in its 14 state territory on a truly nondiscriminatory, pro-competitive
3 basis. What US West can do, Pacific can do.

4 II. FACTUAL BACKGROUND

5 A. The Parties and Their Services

6 Pacific is a monopolist -- it controls the physical facilities that form the ubiquitous
7 local telephone network. The most prominent network features are over 17 million telephone lines
8 to residential and business users (often referred to as "local loops") in California, and over 600
9 central offices (called "COs") where the residential and business telephone lines come together and
10 where the ILECs' telecommunications equipment is located. Declaration of Thomas Regan ("Regan
11 Decl."), ¶¶ 4-5; Declaration of Nora Cregan ("Cregan Decl."), Ex. A (SBC press release).

12 Covad is a start-up, Silicon Valley-based company dedicated to providing high-speed
13 telecommunications services in many regions nationwide. Its first target was the San Francisco Bay
14 Area; its second, Los Angeles. Founded in late 1996 -- not long after passage of the Telco Act --
15 Covad's business plan is to provide a specific type of local telecommunications service: widespread,
16 high-speed connections to Internet service providers and corporate networks through Digital
17 Subscriber Line technology, or "DSL." Covad markets its DSL services under the "TeleSpeed"
18 tradename. Declaration of Charles J. Haas ("Haas Decl."), ¶¶ 2, 7.

19 Covad's strategy depends, ultimately, on two things: ubiquity and speed. Ubiquity is
20 critical because Covad's goal is to permit telecommuters and Internet users throughout entire
21 metropolitan areas to make the high-speed connections they need to access their Internet service
22 providers ("ISPs") and company networks. Covad must be everywhere the corporation's employees
23 or ISPs' customers are. *Id.*, ¶¶ 9, 16. Covad has enjoyed some success to date, but its ability to
24 serve new customers will be jeopardized unless it has the ability to deploy in the COs that serve
25 them. *Id.*, ¶ 9.

26 As for speed, Covad was in many areas the first DSL provider to enter the market,
27 and that time-to-entry advantage over Pacific is crucial to its success. An artificial delay of even a
28

1 few short months could give Pacific, already blessed with all the advantages of a monopolist, an
2 unfair and insurmountable edge over Covad and other CLEC competitors. *Id.*, ¶¶ 3, 6, 10, 18.

3 Pacific alone holds the keys to Covad's goals of ubiquity and speed. Because it
4 controls the local network, Pacific has the ability -- but not the right -- to slow Covad down and limit
5 its reach. And that is precisely what it has done for the past several months -- enough time,
6 apparently, to prepare its own DSL deployment. On May 27, SBC, Pacific's parent company,
7 announced that Pacific is rolling out its "FasTrak" DSL service from 87 central offices throughout
8 California starting in July, 1998, to be "available to more than 5 million California business and
9 residential customers by end of summer." Cregan Decl., Ex. A.

10 **B. The Bottleneck: What Covad Needs to Compete**

11 This case starts from the indisputable fact that Pacific completely controls the local
12 telephone network, a crucial bottleneck for those trying to compete with it. Pacific's
13 monopolization of the local network -- and in particular the local loop and COs -- is so obvious as
14 to be a matter of common knowledge and public record. The FCC has recognized the "**historic**
15 **dominance and ubiquity of the incumbent local exchange carriers (LECs), and their control of**
16 **bottleneck facilities to which new entrants need access in order to compete,**" a control that
17 shows no sign of weakening. *See In the Matter of Local Exchange Carriers' Rates, Terms, and*
18 *Conditions for Expanded Interconnection*, CC Docket No. 93-162, FCC 97-208 (June 13, 1997) at 4
19 (emphasis added) (Cregan Decl. Ex. C); *see also*, Opinion of the Attorney General, *In the Matter of*
20 *the Joint Application of Pacific Telesis Group and SBC Communications for SBC to Control*
21 *Pacific Bell*, A.96-04-038 (CPUC, Dec. 31, 1996) at 3 ("AG's Report") (Cregan Decl. Ex. D)
22 (Pacific "serves approximately 75% of California's 31 million residents;" Pacific is the only
23 supplier of most residential local services). This fact alone places on Pacific the special burdens of
24 a monopolist.

25 Pacific's network is essential because Covad provides its services by means of a
26 combination of its own physical facilities, the purchase of discrete elements of Pacific's network
27 and access to COs in accordance with the parties' Interconnection Agreement and federal law.
28 *See* 47 U.S.C. §§ 251, 252. Regan Decl., ¶¶ 8, 10, Exs. A, B; Haas Dec., ¶ 10.

1 1. **Collocation is the necessary first step to providing**
2 **service -- and competition**

3 Pacific must allow Covad to install its own network equipment in Pacific's COs, a
4 practice known as "collocation." See 47 U.S.C. § 251(c)(6); *In the Matter of Implementation of the*
5 *Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC
6 96-325, 11 F.C.C.R. 15499, ¶ 543 (Aug. 8, 1996) ("*Local Competition Order*") (Cregan Decl., Ex. E);
7 Regan Decl., ¶ 9, Ex. A, ¶ 11 at 43-47. Without dependable, timely and affordable collocation,
8 Covad cannot compete effectively with Pacific. In fact, until Pacific provides workable collocation in
9 a given CO, no one can compete with Pacific at all. Haas Decl., ¶¶ 9-10; Regan Decl., ¶ 9. Section
10 251(c)(6) of the Telco Act explicitly requires ILECs to provide collocation on demand on a
11 nondiscriminatory basis. 47 U.S.C. § 251(c)(6). Moreover, **Pacific may not reject any Covad**
12 **physical collocation request in a Pacific CO on the grounds that space is unavailable unless and**
13 **until Pacific has proved to the California Public Utilities Commission ("CPUC") that space in**
14 **that CO is unavailable.** *Local Competition Order*, ¶ 550; Regan Decl., Ex. A, ¶ 11.5 at 46. Pacific
15 unilaterally sets the dates by which it promises to complete arrangements for collocation, usually 120
16 days from the acceptance of a collocation order, but sometimes longer. Declaration of Marge
17 Donaldson ("Donaldson Decl."), ¶ 5.

18 2. **Covad cannot compete without loops and transport**

19 Simply setting its equipment in a Pacific CO is not enough, of course. Covad
20 needs local loops to connect each of its end users to their respective COs. Covad also needs
21 "transport" to connect its equipment from one CO to another and to Covad's Regional Data
22 Center, and to connect its Data Center to its ISPs and corporate customers. Regan Decl., ¶ 8 and
23 Ex. B. Section 251(c)(3) of the Telco Act requires Pacific to provide loops and transport, again
24 on a nondiscriminatory basis. 47 U.S.C. § 251(c)(3).

25 Pacific exploits Covad's dependence on it. Pacific routinely denies space in COs
26 to Covad without explanation and without proving to the CPUC that space is unavailable.
27 Donaldson Decl., ¶¶ 10-12. Pacific also routinely "misses" its 120-day construction deadline.
28 *Id.*, ¶ 21-23. In addition, Pacific consistently provides untimely and unusable transport and

1 loops, further delaying Covad's services. *Id.*, ¶ 24; Declaration of John Rugo ("Rugo Decl."),
2 ¶¶ 6-7.

3 **C. The Target Downstream Markets: Pacific's Monopoly**

4 Pacific also monopolizes, albeit not as securely, two downstream
5 telecommunications markets. The fact that these monopolies are less secure doubtless explains
6 why Pacific is engaging in the conduct at issue here.

7 Both downstream markets depend on access to Pacific's local telephone network.
8 First, Covad sells its DSL service to medium-sized and large businesses that want to give their
9 telecommuters and after-hours workers access to the corporate network from home. This is the
10 "Local Telecommuter Market." Covad also competes with Pacific to connect Internet Service
11 Providers ("ISPs") with their customers. This is the "Local ISP Market." Haas Decl., ¶ 3.
12 Pacific currently supplies the vast majority of services in both these markets; most customers still
13 rely on regular telephone lines (referred to in the industry as Plain Old Telephone Service, or
14 "POTS") for their Internet and telecommuter connections. *Id.*, ¶ 4.

15 Pacific dominates the Local ISP and Local Telecommuter markets because it controls
16 the local telephone network. Customers can telecommute and gain access to the Internet through a
17 variety of technologies and at a variety of speeds.¹ But anyone seeking to provide service to ISPs or
18 businesses with telecommuting needs on a broad geographic basis -- by any means -- must go
19 through Pacific to buy (among other things) its local loops and collocation. Haas Decl., ¶¶ 9, 10.

20
21 ¹ These technologies are described in the Haas Declaration, ¶¶ 4-7, and in addition to
22 POTS lines, they include faster services such as Integrated Services Digital Network ("ISDN"),
23 available in Pacific's service area only by going through Pacific. *See Pacific Bell*
24 *Telecommuting Guide* (Cregan Decl., Ex. F); Declaration of David Sharnoff ("Sharnoff Decl."),
25 ¶¶ 3-4. Pacific concedes that all these different services compete with one another. As Pacific
26 puts it, there is "market overlap" among higher-speed services and POTS service, they are
27 "complementary services in our continuum of . . . offerings for telecommuters, home business
28 operators and other remote users," and "[t]hese products will coexist for many years to come."
FasTrak DSL, Frequently Asked Questions at 3, Cregan Decl., Ex. G. Finally, even Pacific's less
well known Frame Relay and T-1 services are "available virtually everywhere in the Pacific Bell
serving area." *Id.* at 5. In its own words, "Pacific Bell continues to be the leader" in serving
Internet users and telecommuters. *Id.* at 4.

1 The geographic market for Telecommuter and ISP services is highly circumscribed.
2 To provide service, Covad must have access to every CO that serves the neighborhoods where its
3 end users reside; thus, each CO is its own geographic market. Regan Decl., ¶ 8. Pacific controls
4 every CO and virtually all related facilities, such as local loops and transport, that Covad needs to
5 compete. See AG's Report at 3, 5; Regan Decl., ¶¶ 5-6.

6 **D. Pacific's Predatory Conduct: How It Is Maintaining and Leveraging**
7 **Its Monopoly Power**

8 Just as in *MCI v. AT&T*, 708 F.2d 1081, 1150-52 (7th Cir. 1982), *cert. denied*, 464
9 U.S. 891 (1983), Pacific has engaged in a pattern of interferences, disruptions, and unexplained
10 denials of service to Covad. That conduct has slowed and limited Covad's entry into the Local
11 Telecommuter and Local ISP markets. While, in isolation, not every act may be enough to destroy
12 competition, in combination they have a devastating effect on Covad's critical goals of ubiquity and
13 speed. See *id.* For example:

14 **1. Denial of collocation space**

15 Covad started to order collocation space in Pacific's COs in March, 1997, even
16 before it had an Interconnection Agreement with Pacific. Donaldson Decl., ¶ 9. To date, it has
17 requested space in 165 COs. *Id.* Despite its legal obligations not to do so, Pacific has unilaterally
18 and arbitrarily denied Covad space for collocation in 50 COs. Donaldson Decl., ¶ 10. Pacific gives
19 no explanation; it just returns Covad's deposit and announces "no space available." *Id.*, ¶ 11,
20 Ex. A. Pacific has not, in a single instance, satisfied its duty to prove to the CPUC in advance that
21 no space is available in a CO before denying collocation. *Id.*, ¶ 12. It has also refused to let Covad
22 tour the allegedly exhausted COs. *Id.* These space denials are an absolute bar to competition in the
23 affected COs.

24 **2. Late cage and transport deliveries**

25 Purportedly to satisfy "security" concerns, Pacific requires Covad and other
26 CLECs to enclose their collocated equipment in a "cage," literally a fenced-in 10 x 10 foot space
27 in each CO which ostensibly precludes CLEC access to the remainder of the CO, where Pacific's
28 switching equipment is. In addition to the fencing, cages require extensions of power and air

1 conditioning systems to the area of the CO in which Pacific has chosen for CLECs. As a result,
2 they are time-consuming and expensive to build, costing \$14,000 to \$100,000. These cages are
3 an unnecessary waste of space, time, and money, but in order to speed its entry into the market,
4 Covad has continued to order and pay for cages while disputing Pacific's right to demand them.
5 To date, Covad has paid Pacific over \$1.6 million for cages. Regan Decl., ¶¶ 11-12.²

6 Beyond the expense, Pacific uses the collocation request process to slow
7 competitive entry. Pacific gives itself 30 days just to respond to space requests. Donaldson
8 Decl., ¶ 4. Pacific then typically gives itself 120 days (and sometimes more) to install the cage.
9 *Id.*, ¶ 5. Only after the cage is complete does Pacific permit Covad to order transport to make the
10 network equipment usable, and then it gives itself 19 business days (or about a month) to connect
11 the transport. *Id.*, ¶ 6. Worse, Pacific consistently fails to meet even these leisurely deadlines.
12 To date 60% of all cages that were due before June 1, 1998, have been delivered substantially
13 late, with delays stretching into weeks and sometimes months. *Id.*, ¶ 22. The 19-business day
14 mark for transport regularly goes by unnoticed, sometimes adding weeks of delay. *Id.*, ¶ 24.
15 These delays unnecessarily increase Covad's time to market, and detract from Covad's reputation
16 for quality service, thus providing Pacific with cover to get its own DSL service up and shut the
17 door on competition.

18 3. Local loop failures

19 Pacific routinely fails to deliver timely and properly installed local loops. The loops
20 Pacific does deliver are late, don't work, or both, an astonishing 60% of the time. Rugo Decl., ¶ 6.
21 These failures cause customer dissatisfaction with Covad, and have increased Covad's costs by

22
23 ² There can be no serious question that cages are unnecessary. US West, an ILEC serving
24 14 states, has signed an interconnection agreement that permits Covad to collocate without any
25 cage. This "cageless" method of collocation provides the fast, low-cost entry CLECs need.
26 Pacific has refused to provide cageless collocation, even in COs where Pacific says there is no
27 space. Pacific has also declined to entertain non-cage security measures that might alleviate any
28 security concern while not subjecting CLECs such as Covad to the onerous delay and expense of
building cages. All of this deprives consumers of full and open competition. Regan Decl.,
¶¶ 12-16.

1 forcing it to test local loops before it can notify its end users that service is installed. Rugo Decl.,
2 ¶ 7.

3 Pacific also discriminates in its own favor when provisioning local loops. For
4 example, in February, 1998, when Covad, through the wholesale distribution channel, ordered a local
5 loop to provide DSL service for Lou Pelosi, its director of marketing, it was told there were no loops
6 available. Declaration of Lou Pelosi ("Pelosi Decl."), ¶ 5. Pacific told Covad it would have to
7 perform special construction to add a loop at Mr. Pelosi's home, delaying installation to July 31,
8 1998. *Id.*, ¶¶ 7-8. At that point, Mr. Pelosi ordered, through Pacific's retail channel, Pacific ISDN
9 service, which requires the **same** local loop that Covad had ordered months before. His loop was
10 installed in less than three weeks. *Id.*, ¶¶ 9-12. Despite Covad's express complaint about this
11 discrimination, Pacific still did not install the loop Covad requested until June 11, 1998 -- 129 days
12 after Covad first ordered it. *Id.*, ¶ 15.

13 **4. Unilateral changes to spectral interference requirements**

14 Covad recently learned of a new coercive tactic by Pacific. Pacific unilaterally
15 and arbitrarily announced that all CLEC providers of DSL services must conform to a specific
16 type of DSL technology chosen by Pacific. Rugo Decl., ¶ 3. This is purportedly to reduce the
17 risk of "spectral interference," the phenomenon of stronger signals bleeding over to weaker ones
18 and disrupting service in adjoining cables. *Id.*, ¶ 3 and Ex. A. Yet, Covad has been deploying
19 different DSL technology for months with no complaint, and, indeed, another ILEC has used and
20 permits the use of other DSL technologies. *Id.*, ¶ 3. Nonetheless, Pacific created a protocol in
21 February of 1998 requiring all CLECs to use a specific DSL technology and warning in bold
22 print that **"there will be no exceptions."** *Id.*, Ex. B. The new policy is, in any event,
23 unnecessary. Pacific has not proven that Covad's equipment creates any interference with other
24 telecommunications transmissions. *Id.*, ¶¶ 3, 4. Moreover, the potential ramifications are severe.
25 To comply with the new policy, Covad could be forced to replace the equipment it already has in
26 place in numerous Pacific COs and in consumers' homes. To say the least, this would
27 dramatically increase Covad's costs.

1 In combination, all these incidents represent a pattern of incessant roadblocking
2 that has effectively hindered and delayed competition, prevented Covad from offering ubiquitous
3 and speedy service and, in doing so, maintained Pacific's downstream monopolies.

4 **E. Pacific Has Acted With Improper Intent**

5 Any chance that Pacific's conduct might be written off to the inevitable inefficiency
6 of a slow-moving monopoly was eliminated by (1) Pacific's recent announcement of a massive
7 rollout of its own DSL service and (2) the mounting evidence of its intent to undermine Covad and
8 maintain its monopoly in the Local Telecommuter and Local ISP markets. For example:

9 **1. The "resurvey"**

10 Pacific's manipulative use of space denials shows its improper intent. From the Fall
11 of 1997 through June 1, 1998, Pacific denied collocation space to Covad in 50 COs. Donaldson
12 Decl., ¶ 10. Completely shut out of these COs, Covad was unable to offer its corporate and ISP
13 customers the ubiquitous coverage they demand. Haas Decl., ¶¶ 9, 16. If Pacific had permitted
14 collocation in these COs, Covad would now be up and running (even given Pacific's delaying
15 tactics) and competing with Pacific in nearly 30 additional COs. *Id.*, ¶ 18; Donaldson Decl., Ex. C.

16 In March and April of 1998, Pacific "resurveyed" its COs, and "found" space in many
17 of these exhausted COs. Donaldson Decl. ¶ 18, Ex. C. But Covad will not just get the space it
18 ordered -- it must reorder, on a staggered schedule from June to October, 1998. As a result, Covad
19 will not be able to offer service in these COs until late 1998 and early 1999, even assuming that
20 Covad is granted space and Pacific imposes no delays. *Id.*, ¶¶ 13-20, Ex. C. It hardly appears
21 coincidental that Pacific's own DSL rollout will be complete by the end of summer, months after
22 Covad would have been in business in these COs absent Pacific's tactics, but months before Covad
23 will be ready now. In other words, Pacific has guaranteed itself months as the sole provider of DSL
24 in many COs and eradicated Covad's market lead.

25 **2. Discrimination**

26 Pacific is violating its duty under the Telco Act not to discriminate against Covad
27 in its provision of transport and loops. 47 U.S.C. § 251(c)(3). Take three examples. First, when
28 Covad's director of marketing Lou Pelosi ordered a local loop for Pacific ISDN service, Pacific

1 installed it in 21 days. Yet Covad waited 129 days for that same local loop, and had been told
2 not to expect it for another 53 days after that. Pelosi Decl., ¶¶ 8, 12, 15-16.

3 In a second instance, Covad needed transport (a T-1 line) to connect Covad's
4 Regional Data Center to the Palo Alto CO, which serves one of Covad's most important customers,
5 Stanford University. Covad ordered the line on July 9, 1997, using Pacific's normal ordering
6 procedure for CLECs. Pacific did not deliver the line until October 29, 1997, 16 weeks later. But
7 when Stanford needed transport from its computer network through the Palo Alto CO to Covad's
8 Regional Data Center, Covad ordered through the retail channel, which Pacific uses to serve its own
9 retail customers. That order, for the same service, took only about 5 weeks. Haas Decl., ¶¶ 13, 14.

10 Third, a potential customer informed Covad that Pacific quoted the customer an
11 installation interval of seven business days for Pacific ISDN service. Yet, when Covad deploys its
12 DSL service, Pacific imposes a ten-day wait for the local loop. Thus, Pacific provides its retail
13 customers full ISDN services, including loop installation, three days faster than it takes to give
14 Covad loop installation alone. Haas Decl., ¶ 12.

15 **3. The DSL rollout**

16 SBC has for some time been offering trial DSL service in both California and Texas.
17 Cregan Decl., Ex. B. Yet SBC is introducing its self-described accelerated rollout of DSL service
18 only here in California, where Covad is providing competition, and not in Texas, where Covad does
19 not offer DSL service. Indeed, an SBC representative told a former Covad employee that Covad is
20 the only reason the SBC family is offering DSL service. Haas Decl., ¶ 19; Ex. A.

21 Pacific has also positioned its DSL offering to create the impression (already
22 ingrained in consumers from years of monopoly) that Pacific's is the only available DSL service.
23 Cregan Decl., Ex. A. More sinister, it touts the merits of ubiquity, which it has as a result of its local
24 network monopoly, but which it has prevented Covad and other CLECs from offering. *Id.*

25 **4. Product disparagement**

26 Pacific is also continuing to discourage DSL usage, especially when it means losing a
27 current ISDN customer to DSL. Recently a Pacific ISDN customer called to cancel his ISDN service
28 because he had chosen to use Covad DSL for his connection to his ISP. Pacific "recommended"

1 that he wait before canceling his ISDN service, because DSL technology might not perform as
2 expected. Declaration of Michael Gabrys ("Gabrys Decl."), ¶ 3. Pacific has no basis to disparage
3 the performance of Covad's DSL service.

4 **F. The Effect on Covad**

5 Pacific's anticompetitive conduct has had a significant impact on Covad's ability to
6 compete in the Local Telecommuter and Local ISP markets. In particular, Covad has lost months of
7 invaluable time to market, and, unless given parity with Pacific's large scale DSL entry, will lose its
8 "first mover" advantage in the Local Telecommuter Market.³ That time advantage cannot be
9 restored. Covad has lost customers and revenue as a result of Pacific's failure to provide collocation
10 space and failure to deliver cages, transport and local loops on time. Haas Decl., ¶¶ 16, 18. Pacific's
11 service failures have also cost Covad goodwill. For example, customers have been particularly upset
12 when Covad has been unable to meet commitments due to Pacific's failure to meet its cage and
13 transport commitments. Those delays in service were caused solely by Pacific. *Id.*, ¶ 16. Because
14 Pacific has hindered Covad's ability to provide blanket coverage, Covad has also lost business with
15 ISPs, which have been unable to guarantee service to some potential end users. Miller Decl., ¶¶ 6, 7;
16 Sharnoff Decl., ¶¶ 7-9.

17 **G. The Effect on Competition**

18 The effect on consumers is even greater. Competition in the Local ISP and Local
19 Telecommuter markets is in its nascent stages. Consumers have traditionally had no option but to
20 get their service from Pacific. As competition begins, Pacific already has enormous advantages over
21 its competitors: it needs no cage; it already owns the transport and loop facilities; it is already
22 present in every home and nearly every office in its service area. Not satisfied with the advantages
23 of one monopoly, Pacific is using those tools uniquely at its disposal to cripple competition in the
24 Local ISP and Local Telecommuter markets.

25
26
27 ³ Covad has CLEC competitors in the Local ISP market, but has been the first to exploit
the Telecommuter market in many areas of the state. Haas Decl., ¶ 3.

1 If Pacific succeeds in holding Covad and other CLECs back while establishing itself
2 as the dominant DSL provider, competition will not recover. Consumers will suffer, because Pacific
3 will either marginalize DSL service (as it has done with ISDN), monopolize it, or both. Sharnoff
4 Decl., ¶¶ 4, 10; *see* Gabrys Decl., ¶ 3; Miller Decl., ¶ 8. Either way, consumers lose. As they have
5 for years, consumers will have to be satisfied with whatever services, and whatever quality of
6 service, Pacific decides to deliver.

7 **III. COVAD IS ENTITLED TO AN INJUNCTION TO PREVENT**
8 **FURTHER DISCRIMINATORY AND ANTICOMPETITIVE**
9 **CONDUCT BY PACIFIC**

10 **A. Standards for Injunctive Relief**

11 To obtain a preliminary injunction, Covad need only show either “(1) a combination
12 of probable success on the merits and the possibility of irreparable injury, or (2) that serious
13 questions are raised and the balance of hardships tips sharply in its favor.” *Dr. Seuss Enterprises v.*
14 *Penguin Books USA, Inc.*, 109 F.3d 1394, 1396 n.1 (9th Cir.), *cert. dismissed*, 118 S. Ct. 27 (1997).
15 “These formulations are not different tests but represent two points on a sliding scale in which the
16 degree of irreparable harm increases as the probability of success on the merits decreases.” *Id.*
17 (quoting *Big Country Foods, Inc. v. Board of Educ.*, 868 F.2d 1085, 1088 (9th Cir. 1989)). Covad
satisfies this test from any angle.

18 **B. Covad Is Likely to Prevail on the Merits**

19 Covad satisfies the first prerequisite for injunctive relief because it will prevail on
20 the merits of its claims against Pacific. For purposes of this motion only, Covad limits its
21 analysis to the following claims:

- 22 (1) Monopoly leveraging in violation of Sherman Act Section 2, 15 U.S.C. § 2;
- 23 (2) Denial of an essential facility in violation of Sherman Act Section 2;
- 24 (3) Attempted monopolization in violation of Sherman Act Section 2;
- 25 (4) Violations of Section 251 of the Telco Act; and
- 26 (5) Unfair competition in violation of Section 17200 of the California
27 Business & Professions Code.

28 Likelihood of success on any one of these claims is sufficient.

1 **1. Section 2 Monopolization -- Monopoly Leveraging**

2 Pacific seeks to use its control over the monopoly building blocks of the local
3 telephone network to maintain its dominance over other markets that depend on those building
4 blocks. See Pacific Telesis Annual Report at 6 (1995) ("We're leveraging our networks and
5 customer relationships to lead the market") (Cregan Decl., Ex. J). That monopoly leveraging
6 plan is working. It is also plainly illegal. See *Image Technical Services v. Eastman Kodak Co.*,
7 125 F.3d 1195, 1208 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1560 (1998) ("*Kodak II*")
8 (monopoly to monopoly leveraging is unlawful). Moreover, the illegality of Pacific's plan is
9 nothing new -- Pacific is taking the same "death by a thousand cuts" approach that led to the
10 breakup of the Bell system. See, e.g., *MCI*, 708 F.2d at 1150-52; *United States v. AT&T*, 524 F.
11 Supp. at 1344.

12 Pacific's behavior satisfies both fundamental elements of a Section 2 claim: "(1) the
13 possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance
14 of that power as distinguished from growth or development as a consequence of a superior product,
15 business acumen, or historical accident." *Eastman Kodak Co. v. Image Technical Services*, 504
16 U.S. 451, 481 (1992) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).⁴

17 **a) Pacific's monopoly power is beyond question**

18 There is no doubt about Pacific's monopoly power. The Court may infer Pacific's
19 market power from its enormous market share. See *Grinnell*, 384 U.S. at 571 ("The existence of
20 [monopoly] power ordinarily may be inferred from the predominant share of the market"). While
21 no set percentage of market share is required for a finding of monopoly power, clearly Pacific's
22 near-100% market share indicates market power. See *United States v. E.I. du Pont de Nemours &*
23 *Co.*, 351 U.S. 377, 379, 391 (1956) (75% market share constitutes monopoly power); *Grinnell*, 384
24 U.S. at 571 (80% market share is a "substantial monopoly" and 87% "leaves no doubt . . . that
25

26
27 ⁴ An antitrust plaintiff must also establish that it has suffered injury. We address the
28 continuing and threatened injury to Covad below, at Section III.C, below.

1 defendants have monopoly power"); *see also Kodak II*, 125 F.3d at 1206 ("Courts generally require
2 a 65% market share to establish a prima facie case of market power").

3 Pacific has monopoly power in both the upstream and leveraged markets. Upstream,
4 Pacific's market share in the basic facilities that form the local telephone network is extraordinarily
5 high -- as to COs and local loops it approaches 100%.⁵ Covad needs access to these facilities, and
6 Pacific is the only provider in its historical territory, which is the overwhelming majority of
7 California. Downstream, Pacific has enjoyed unquestioned status as the dominant provider to the
8 Local Internet and Local Telecommuter markets. *See* pp. 4, 6-7, above.

9 Market power is also enhanced by the existence of entry barriers, and they are
10 indisputably high here. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 816 (8th Cir. 1997), *cert.*
11 *granted*, 118 S. Ct. 879 (1998) ("the amount of time and capital investment involved in the
12 construction of a complete local stand-beside telecommunications network are substantial barriers
13 to entry"). It would cost billions of dollars to recreate Pacific's ubiquitous network of COs, local
14 loops and transport facilities in California. *See In the Matter of the Public Utility Commission of*
15 *Texas*, FCC 97-346, CCBPol 96-13 (Oct. 1, 1997) (AT&T estimates that statewide buildout in
16 Texas would cost "approximately \$5.3 billion") (Cregan Decl., Ex. H); *see also AT&T v. City of*
17 *Austin*, 975 F. Supp. 928, 934 (W.D. Tex. 1997). For those who seek collocation space, local loops,
18 and transport facilities, Pacific is the only game in town.

19 **b) Pacific is actively leveraging its monopoly power**

20 Pacific also fails the second element of a Section 2 claim, the conduct element.
21 "[T]he use of monopoly power, however lawfully acquired, to foreclose competition, to gain a
22 competitive advantage, or to destroy a competitor is unlawful." *United States v. Griffith*, 334 U.S.
23 100, 107 (1948); *Kodak*, 504 U.S. at 482-83. Put another way, "[i]f a firm has been attempting to
24 exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as
25 predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985)

26
27 ⁵ Pacific's monopoly power over transport facilities is also dominant. Covad has no
28 alternative suppliers of transport facilities in most COs. Haas Decl., ¶ 10.

(quotation marks and footnote omitted). Pacific's conduct demonstrates a classic squeeze play -- in Part One of the plan, Pacific keeps Covad out of COs for as long as possible while it develops a competing DSL product; in Part Two, Pacific rolls out its DSL service to areas it has prevented Covad from serving, while touting its ubiquity advantage.

In the real world, Pacific has executed the plan brilliantly. Covad stood ready to compete with Pacific in the Local ISP and Local Telecommuter markets when, back in late 1997, it requested space in a large number of Northern California COs. Pacific effectively blocked Covad's entry in a variety of ways, including:

- outright refusing to allow Covad to collocate its equipment in no less than 50 COs. Given that Covad had requested collocation in 165 COs, this represented an alarmingly high 30% refusal rate.⁶ See p. 7, above.
- unreasonably and consistently delaying Covad's entry into even those COs where it deigned to grant access. In fact, about 60% of all cages due before June 1, 1998 have been late. See pp. 7-8, above.
- unreasonably and discriminatorily delaying Covad's entry by consistently providing poor service. For example, Pacific's loop deliveries for Covad were either late or unusable nearly 60% of the time. In other instances, Covad found loop and/or transport facilities were "unavailable" when Covad ordered them, but "available" when customers ordered them directly from Pacific. See pp. 8-9, above.
- unreasonably requiring competing providers of DSL service to adhere to arbitrarily determined technical criteria, ostensibly to protect against "spectral interference," but in

⁶ Worse, Pacific did so without any pretense of complying with its contractual obligation (also found in the FCC's *Local Competition Order*, ¶ 550) not to refuse physical collocation without first proving to the CPUC that no such space existed. Having failed to comply with the requirements for claiming no space was available, Pacific must be estopped from claiming unavailability now -- any contrary result would just encourage such gamesmanship by Pacific and the other ILECs. The "penalty" for not timely proving its claims of space unavailability cannot be merely to keep Pacific's would-be competitors waiting even longer until Pacific finally gets around to trying to comply with its obligations.

1 reality not necessary to do so. This threat to cut off DSL service not corresponding to Pacific's
2 arbitrary standards could require a massive capital expenditure by Covad, and would in any event
3 delay and degrade the quality of Covad's service. See p. 9, above.

4 The culmination of Pacific's scheme came on May 27, 1998. Having prevented
5 Covad's entry into numerous geographic areas, and significantly delaying its entry into all others,
6 Pacific grandly announced its plan to deploy a new ADSL service -- one that competes directly with
7 Covad's service. But Pacific's rollout will come without the unexplained and illegal space refusals
8 and unconscionable delays it imposed on Covad. Pacific proposes to have service available to more
9 than 5 million customers by end of summer. What's more, Pacific promises -- indeed, publicly
10 touts -- the broad reach of its service offering. Cregan Decl., Ex. A. Its press release is plainly
11 calculated to create the impression that Pacific is the only source for DSL service, an impression that
12 Pacific threatens to turn into a reality.

13 The bottom line is clear -- Pacific's plan is working, and it threatens to allow Pacific
14 to maintain its existing monopoly over the Local Internet and Local Telecommuter markets. If that
15 happens, it will be to the great detriment of consumers, as well as competitors such as Covad.

16 c) **There is no legitimate business justification for**
17 **Pacific's anticompetitive conduct**

18 Pacific can offer no legitimate business justification for hindering competition by
19 refusing collocation, delaying Covad's market entry, unilaterally changing accepted technical
20 requirements, and disparaging Covad's service to potential customers. Pacific's conduct is not, and
21 cannot be, "predominantly motivated by legitimate business purposes." *Calculators Hawaii, Inc. v.*
22 *Brandt, Inc.*, 724 F.2d 1332, 1339 (9th Cir. 1983) (citation omitted); see also *High Tech. Careers v.*
23 *San Jose Mercury News*, 996 F.2d 987, 990-91 (9th Cir. 1993). Moreover, where a stated business
24 justification is simply a pretext for anticompetitive conduct, that justification will not foreclose
25 Section 2 liability. *Kodak*, 504 U.S. at 483-84; *High Tech.*, 996 F.2d at 992; see also *City of*
26 *Anaheim v. Southern Cal. Edison Co.*, 1990-2 Trade Cas. ¶ 69,246, 1990 WL 209261, *33 (C.D.
27 Cal. Oct. 22, 1990), *aff'd*, 955 F.2d 1373 (9th Cir. 1992) ("Court looks at the defendant's overall
28

1 conduct and the reasons the defendant gives for it to see if the conduct was reasonably necessary to
2 competition on the merits”).

3 2. Section 2 Monopolization -- Essential Facilities

4 It is a violation of Section 2 when “one firm, which controls an essential facility,
5 denies a second firm reasonable access to a product or service that the second firm must obtain to
6 compete with the first.” *Kodak II*, 125 F.3d at 1210; *see also MCI*, 708 F.2d at 1132-33 (quoting
7 *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991), *cert. denied*, 503
8 U.S. 977 (1992)). There are four elements to an essential facilities claim: “(1) control of the
9 essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to
10 duplicate the essential facility; (3) the denial of the use of the facility to a competitor and (4) the
11 feasibility of providing the facility.” *City of Anaheim v. Southern Cal. Edison Co.*, 955 F.2d
12 1373, 1380 (9th Cir. 1992). Covad’s essential facilities claim is overwhelming.

13 *First*, Pacific controls the local network, including COs, loops, and transport, and
14 they are indispensable to anyone seeking to compete with Pacific in the Local ISP and Local
15 Telecommuter markets. *See* pp. 4-7, above.

16 *Second*, Covad could not hope to duplicate that ubiquitous network -- the time and
17 money constraints would be insurmountable. *See*, p. 15, above.

18 *Third*, Pacific has hindered reasonable access to its network by the many means
19 described above, including unlawful and unapproved denials of space, unreasonable delays in
20 provisioning service, and unreasonable cage-building requirements. *See*, pp. 7-12, above.

21 *Finally*, it is demonstrably practical for Pacific to provide meaningful,
22 nondiscriminatory access to its network. US West, Pacific’s ILEC neighbor to the North, is
23 today already doing (in 14 states) what Pacific would contend is impossible to do -- US West is
24 offering cageless collocation. In addition, if legitimate space constraints had truly motivated its
25 denials of collocation, Pacific could have proved that to the CPUC, as it was obliged to do.
26 Pacific’s consistent failure to follow that mandated procedure, and its subsequent, belated
27 “discoveries” of more space when pressured by Covad, estop Pacific from claiming that it was
28 not practical to provide collocation to Covad in all COs.